OCBC Bank (M) v Omega Horizon Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–60 OF 2000 III (II)
LAU BEE LAN JC
29 JULY 2004

Banking — Banks and banking business — Conclusive evidence clause — Defendants did not dispute amount stated in plaintiff's statement of account — Whether conclusive evidence clause applied against defendants

Contract — Terms — Construction — Agreement provided for mode of notification of interest rate — Whether ejusdem generis doctrine applicable to contract

Contract — Variation — Oral agreement — Variation of interest rate — Facility agreement provided for mode of notification of variation of interest rate — Whether there was oral agreement for variation of interest rate

This was an appeal by the plaintiff against the deputy registrar's decision in dismissing the plaintiff's application for summary judgment to be entered against the defendants. The defendants' main contention was that the plaintiff had reneged on its verbal promise to reduce the interest rate charged upon the facility granted to the first defendant. The second to the sixth defendants were the guarantors.

Clause 5.5 of the facility agreement entered into between the plaintiff and the first defendant stipulated, inter alia, that the lender (that is, the plaintiff) may at any time and from time to time at its sole and absolute discretion by notice in writing to the borrower (that is, the first defendant) of its intention so to do vary the rate of interest whether by varying the base lending rate and/or the margin or the entire mode or manner of computation of interest and any such variation shall take effect as from the date determined or stipulated by the lender in such notice. The clause further stipulated that such notice of variation may be effected by a notification of the variation in the periodic bank statements furnished by the lender to the borrower from time to time or by way of a separate written notice signed by any officer of the plaintiff for the time being or by way of an unsigned notice or letter printed or produced electronically or by mechanical means or by the plaintiff's computer or by way of advertisement in any newspaper or by way of notification at the lender's premises where the borrower's account was maintained or in such other manner as the lender may at its sole and absolute discretion deem fit.

Held, allowing the appeal:

(1) The defendants were under a misconception as to the interpretation to be accorded to cl 5(5) of the facility agreement. This clause comprised two limbs. The first limb required that the notice must be in writing and

the second limb stipulated that the notice may be effected by various modes as specified in the clause. The defendants had suggested that the phrase 'in such other manner as the lender may at its sole and absolute discretion deem fit' in the said cl 5.5 allowed the plaintiff to vary the interest verbally. Such an interpretation was totally misconceived as the phrase 'in such manner as the lender may at its sole and absolute discretion deem fit' must be read in accordance with the *ejusdem generis* doctrine. Although the facility agreement was a contract and not a statute, the *ejusdem generis* doctrine was equally applicable and as such, the phrase 'in such manner as the lender may at its sole and absolute discretion deem fit' meant that the notice of variation had to be effected in a written form like the form prescribed in cl 5(5) (see paras 8–12).

(2) The defendants admitted that they had received the plaintiff's written notification on the variation in interest rate. The fact the defendants did not query the mode of notifying the variation of interest, which had been effected in writing, made it extremely difficult for the court to believe that the plaintiff had made the verbal promises or assurances as contended by the defendants (see para 13).

(3) Since the defendants had claimed that they had withheld payments because they had acted on the verbal promises and assurances of the plaintiff, it would not be unreasonable for the defendants, as prudent businessmen, to dispute the plaintiff's statement of accounts. However, this was not the case. As such, by virtue of the certificate of indebtedness clause in the facility agreement and the guarantee, the amount certified by the plaintiff was conclusive evidence of the defendants' indebtedness (see paras 23).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh plaintif terhadap keputusan timbalan pendaftar yang menolak permohonan plaintif untuk penghakiman terus dimasukkan terhadap defendan-defendan. Hujah utama defendan-defendan adalah bahawa plaintif telah memungkiri janji lisannya untuk mengurangkan kadar faedah yang dikenakan ke atas kemudahan yang diberikan kepada defendan pertama. Defendan-defendan pertama hingga keenam sebagai penjamin-penjamin.

Klausa 5.5 perjanjian kemudahan yang dimasuki antara plaintif dan defendan pertama menetapkan, antara lain, bahawa pemberi pinjaman (iaitu, plaintif) boleh pada bila-bila masa dan dari masa ke masa dengan satu-satunya budi bicaranya yang mutlak melalui notis secara bertulis kepada peminjam (iaitu, defendan pertama) tentang niatnya untuk mengubah kadar faedah sama ada dengan mengubah kadar pinjaman asas dan/atau margin atau cara keseluruhan pengiraan faedah dan apa-apa perubahan sedemikian akan mula berkuat kuasa dari tarikh yang ditentukan atau ditetapkan oleh pemberi

pinjaman dalam notis tersebut. Klausa tersebut seterusnya menetapkan bahawa notis perubahan boleh berkuat kuasa dengan pemakluman tentang perubahan dalam penyataan-penyataan bank berkala yang dikemukakan oleh pemberi pinjaman kepada peminjam dari masa ke semasa atau melalui notis bertulis berasingan yang ditandatangani oleh mana-mana pegawai plaintif buat sementara waktu atau melalui notis yang tidak ditandatangani atau surat yang dicetak atau dihasilkan secara elektronik atau melalui cara mekanikal atau oleh komputer plaintif atau melalui iklan dalam apa-apa surat khabar atau melalui pemakluman di premis pemberi pinjaman di mana akaun peminjam diselenggarakan atau dalam cara lain yang pemberi pinjaman dengan satu-satunya budi bicaranya yang mutlak fikirkan sesuai.

Diputuskan, membenarkan rayuan tersebut:

(1) Defendan-defendan mempunyai tanggapan salah berhubung tafsiran kl 5(5) perjanjian kemudahan. Klausa ini mengandungi dua cabang. Cabang pertama menghendaki notis dibuat secara bertulis dan cabang kedua menetapkan bahawa notis boleh dikuatkuasakan oleh pelbagai cara seperi yang ditetapkan dalam klausa tersebut. Defendan-defendan mencadangkan bahawa frasa 'in such other manner as the lender may at its sole and absolute discretion deem fit' dalam kl 5.5 membenarkan plaintif mengubah faedah tersebut secara lisan. Tafsiran sedemikian sememangnya disalah tanggap kerana frasa 'in such manner as the lender may at its sole and absolute discretion deem fit' harus dibaca bersesuaian dengan doktrin *ejusdem generis*. Meskipun perjanjian kemudahan tersebut adalah satu kontrak dan bukan statut, doktrin *ejusdem generis* sama juga terpakai dan oleh itu, frasa 'in such manner as the lender may at its sole and absolute discretion deem fit' bermaksud bahawa notis perubahan telah dikuatkuasakan secara bertulis dalam bentuk yang ditetapkan dalam kl 5(5) (lihat perenggan 8–12).

(2) Defendan-defendan mengakui bahawa mereka telah menerima pemakluman bertulis plaintif berhubung perubahan dalam kadar faedah. Hakikat bahawa defendan-defendan tidak menyoal cara memaklumkan perubahan faedah tersebut, yang telah dilakukan secara bertulis, membuatnya sukar untuk mahkamah mempercayai bahawa plaintif telah membuat janji dan jaminan secara lisan sebagaimana yang dihujah oleh defendan-denfendan (lihat perenggan 13).

(3) Memandangkan defendan-defendan mendakwa bahawa mereka menahan pembayaran kerana mereka telah bertindak berdasarkan janji dan jaminan lisan plaintif, ia tidaklah munasabah untuk defendan-defendan, sebagai ahli-ahli perniagaan yang berhati-hati, untuk mempertikaikan penyata akaun plaintif. Namun begitu, ini bukan kesnya. Oleh itu, menurut klausa sijil keberhutangan dalam perjanjian kemudahan dan jaminan tersebut, jumlah yang disahkan oleh plaintif

adalah keterangan konklusif tentang keberhutangan defendan-defendan (lihat perenggan 23).]

Notes

For cases on conclusive evidence clause, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1667.
For cases on construction terms, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4642–4662.
For cases on oral agreements, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4867–4868.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Tai Hing Cotton Mill Ltd v Liu Chong King Bank Ltd [1986] AC 80 (refd)
United Asian Bank v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 82 (distd)
Wong Nget Thau & Anor v Tay Choo Foo [1994] 3 MLJ 723 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 56 r 1

Lam Ko Luen (David Allan, Sagah & Talma) for the plaintiff.
Gabriel Wong (Detta Samen & Co) for the defendants.

Lau Bee Lan JC:

[1] This matter emanates from a notice of appeal pursuant to O 56 r 1 of the Rules of the High Court 1980 ('the RHC') filed by the appellant/plaintiff ('the plaintiff') against the learned deputy registrar's decision dated 28 February 2002 dismissing the plaintiff's application for summary judgment under O 14 of the RHC to be entered against the first, second, third, fourth, fifth and sixth defendants ('the defendants' or singularly as the 'first defendant', 'second defendant', 'third defendant', fourth defendant', 'fifth defendant' and 'sixth defendant' as the case may be) with costs in terms of the amended writ of summons and amended statement of claim dated 25 August 2001 and 25 August 2001 respectively.

[2] The plaintiff's summons in chambers application (encl 17) is essentially on the ground that the defendants have no defence; whilst the defendants' main bone of contention is that the plaintiff had by verbal promises and assurances to reduce the margin rate of interest charged upon the facility granted to the first defendant reneged 5 upon the alleged promises and assurances which in turn means that the first defendant has not committed any default under the facility agreement which attract the principle

of promissory estoppel and constitute unconscionable conduct on the part of the plaintiff.

[3] The plaintiff's application is supported by the following affidavits:

(1) the affidavit of Nicholas Ting Sze Mieng affirmed on 20 October 2000 ('plaintiff's first affidavit') (encl 17).

(2) affidavit in reply of Foo Chow Lee affirmed on 20 December 2000 ('plaintiff's second affidavit') (encl 23).

(3) affidavit in reply (2) of Foo Chow Lee affirmed on 12 April 2001 ('plaintiff's third affidavit') (encl 36).

(4) affidavit of Lim Lean See and Koay Teng Sdng affirmed on 15 June 2001 ('plaintiff's fourth affidavit') (encl 43).

[4] The defendants have opposed the application vide the following affidavits:

(a) affidavit in opposition of Ow Eang Yeow affirmed on 6 November 2000 (for first defendant) ('first defendant's affidavit') (encl 19).

(b) affidavit in opposition of Ow Eang Yeow affirmed on 6 November 2000 (for second, third, fourth, fifth and sixth defendants) ('second, third, fourth, fifth and sixth defendants' affidavit') (encl 20).

(c) supplementary affidavit of Ow Eang Yeow affirmed on 18 December 2000 ('defendants' supplementary affidavit') (encl 25).

(d) second affidavit in opposition of Ow Eang Yeow affirmed on 31 January 2001 ('defendants' second affidavit') (encl 32).

(e) affidavit of Chan Meng Ngai affirmed on 18 May 2001 ('defendants' third affidavit') (encl 41).

(f) affidavit in reply of Chan Meng Ngai affirmed on 30 June 2001 ('defendants' fourth affidavit') (encl 50).

(g) Third affidavit in opposition of Ow Eang Yeow affirmed on 10 July 2001 ('defendants' fifth affidavit') (encl 48).

[5] The court has considered the pleadings, the respective affidavits, the submissions (both written and oral) of both the learned counsel and the authorities submitted therein. The court's findings and evaluation include the following:

(1) It is not disputed that the plaintiff's claim is made pursuant to —

(i) a letter of offer dated 31 October 1995 ('the facility letter') and as amended by the plaintiff's letter dated 10 November 1995 (exh NT 1 and NT 2);

(ii) a facility agreement (between the first defendant as the borrower and the plaintiff as the lender dated 18 January 1996 ('the facility agreement') (exh NT 3); and

(iii) a letter of guarantee (between the second, third, fourth, fifth and sixth defendants as guarantors jointly and severally and the plaintiff) dated 14 December 1995 ('the guarantee') (exh NT 4).

[6] Under the said facility letter, the plaintiff had approved the first defendant's application for an overdraft facility of RM1,680,000 subject to the terms and conditions contained in the facility letter and the facility agreement.

(2) The law governing an application under O 14 is trite and the court is mindful of the principles enunciated and the approaches taken by the courts. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at pp 400–401, the Supreme Court held at headnote (2):

> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then a judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

[7] In the case of *Wong Nget Thau & Anor v Tay Choo Foo* [1994] 3 MLJ 723 at pp 735–736 where the evidence is conflicting as in the instant case, his Lordship Ian Chin J has in an illuminating manner stated:

> It is said in *Banque De Paris Et Des Pays-Has (Suisse) SA v Costa De Naray & Anor* [1984] 1 Lloyd's Law Report 21, at p 23:
>
> > 'It is of course trite law that O 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; *the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants' having a real or bonafide defence*.'
>
> I am of the view that in order to look at the whole situation, as the just quoted case says, I must surely go through the affidavits and documentary evidence and I *cannot imagine any court doing that cursorily. Though it is trite law that a conflict of evidence ought not to be disposed of on affidavit evidence only, it is also trite law that the affidavit evidence must not be uncritically accepted and this what the Privy Council in Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 at p 217 said*:
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> > '... Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in

precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be ...'

Therefore, the affidavit evidence would have to be examined in detail to see if 'there is a fair or reasonable probability of the defendants' having a real or bona fide defence'. I am of the view that whole of the evidence has to be looked at, even it involves minute examination of documents and facts, if by such exercise the court can come to a conclusion that there is no fair or reasonable probability of the defendants' having a real or bona fide defence. The Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (PC) went though the evidence with a fine tooth comb, (that was what the Supreme Court was of the opinion of in *Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16). I do not see why the court cannot do that in an O 14 proceeding. The Court also went through the evidence in *Banque De Paris Et Des Pays-Bas (Suisse) SA v Costa De Naray and Anor* in considerable detail. I have also gone through the evidence in detail in the case of *Ribu Daya Sdn Bhd v Malsa Ideal Sdn Bhd & Ors* (Tawau High Court Civil Suit No T25–1991, 2 July 1994. Other courts appear to have already taken a similar view, like the High Court in Penang in the cases of *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 and *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368. Could it then, after going through the affidavits and documentary evidence and considering the circumstances, be said that there is a fair or reasonable probability of the defendant having a real or bona fide defence? What the court has to do in order to arrive at that decision is stated by the Supreme Court in *asil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 at pp 321–322 thus:

'It need hardly be emphasized that in order for the court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. *It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.'* (Emphasis added.)

[8] I see no reason why I cannot be persuaded to follow the approach advocated by the learned judge in *Wong Nget Thau*'s case (bearing in mind the facts and circumstances of this instant case which is discussed hereafter.

(3) I am of the view that the defendants are under a misconception as to the interpretation to be accorded to cl 5(5) (variation of interest) in the facility agreement. Clause 5.5 stipulates —

(5) Notwithstanding the rate of interest, commission, commitment fees, bank charges and such other charges stipulated in Schedule 11 of Clause 5(4), *the Lender may at any time and from time to time at its sole and absolute discretion by notice in writing to the Borrower of its intention so to do vary the rate of interest*, commission, bank charges and such other charges and or *the* rate of late payment interest payable on any excess sum whether by varying the Base Lending Rate and or the Margin or the entire mode or manner of computation of interest, commission, commitment fees, bank charges and such other charges and *any such variation shall take effect as from the*

date determined or stipulated by the Lender in such notice. Such notice of variation may be effected by a notification of the variation in the periodic hank statements furnished by the Lender to the Borrower from time to time or by way of a separate written notice signed by any officer of the Lender for the time being or by way of an unsigned notice or letter printed or produced electronically or by mechanical means or by the Lender's computer or by way of advertisement in any newspaper or by way of notification at the Lender's premises where the Borrower's account is maintained or in such other manner as the Lender may at its sole and absolute discretion deem fit. (Emphasis added.)

[9] I wholly agree with the learned counsel for the plaintiff's submission that this clause comprises two limbs, ie the first limb requires that the notice must be in writing and the second limb stipulates that the notice may be effected by various modes as specified in the clause which for convenience is categorised as follows:

(a) a notification of the variation in the periodic bank statements furnished by the lender to the borrower from time to time;

(b) by way of a separate written notice signed by any officer of the lender for the time being;

(c) by way of an unsigned notice or letter printed or produced electronically or by mechanical means or by the lender's computer;

(d) by way of advertisement in any newspaper;

(e) by way of notification at the lender's premises where the borrower's account is maintained; or

(f) in such other manner as the lender may as its sole and absolute discretion deem fit.

[10] By virtue of paras 3.3 and 3.4 of the defendants' reply submission (p 75 of encl 102), the defendants appear to suggest that the phrase 'in such other manner as the lender may at its sole and absolute discretion deem fit' allows the plaintiff to vary the interest verbally. With due respect to the learned counsel, such an interpretation is totally misconceived as the phrase 'in such manner as the lender may at its sole and absolute discretion deem fit' has in my view to be read in accordance with the ejusdem generis doctrine. The learned author of *Bindra's on Interpretation of Statutes* at p 273 has this to say:

The words *ejusdem generis* means 'of the same kind or nature'. The rule of *ejusdem generis* is that where particular words are followed by general, the general words should not be construed in their widest sense but should be held as applying to objects, persons or things of the same general nature or class as those specifically enumerated, unless of course there is a clear manifestation of a contrary purpose.

[11] Although the facility agreement is a contract and not a statute, I respectfully submit that the *ejusdem generis* doctrine is equally applicable.

[12] Hence, based on the said principle the phrase 'in such manner as the lender may at its sole and absolute discretion deem fit' has to be interpreted that the notice of variation has to be effected in a written form like the form prescribed in items (a) to (e) above. Further, I believe I am fortified in my view by the emphasis made in cl 5(5) with reference to the notice being in writing by the existence of the word 'such' appearing in two other phrases, namely:

(a) 'and any such variation shall take effect as from the date determined or stipulated by the Lender *in such notice*.'

(b) '*Such notice* of variation may be effected by a notification of the variation ...'

(4) By virtue of cl 5(5) of the facility agreement, it is untenable and unreasonable for the defendants, in particular the second and third defendants being experienced businessmen (being common directors and shareholders of Star Edge Sdn Bhd, Omega Horizon Sdn Bhd and Hotel Rasa Sayang Sdn Bhd) to contend that such reduction in interest could be verbally assured. Further, this lends credence to the fact that the contention of the defendants that the plaintiff made verbal promises as being inherently improbable.

[13] Learned counsel for the defendants submitted that it is improper for the plaintiff to rely on cl 5.5 of the facility agreement as it was 'never even specifically mentioned at all in the numerous affidavits filed by the parties in the context of the allegations of promises made by the plaintiff in relation to any reduction in the interest rate. Nor did the plaintiff specifically adduce any evidence that any such promises must be made subject to the fulfillment of the conditions stipulated in cl 5.5.' (see para 1.1 of encl 103(b)). In this regard, I agree with the reply submitted by the learned counsel for the plaintiff in para 11 of encl. 105. I also wish to add that exh NT 1 (the letter of offer) which was not disputed by the defendants contain three material provisions which bind the defendants contractually:

(i) Para 2 — 'This facility is provided in accordance with the following terms and conditions'.

(ii) Para 3 — 'This offer is conditional upon preparation, execution and delivery of legal documentation in form and substance satisfactory to us and to our legal counsel within a period of two month? from *the date of acceptance of this offer*'.

(iii) Acknowledgment of the letter of offer by the defendants (duly signed by three signatures) to the effect 'We/I hereby accept and acknowledge the above terms and conditions'.

(5) The defendants are aware and acknowledge that variation of interest has to be in writing as they do not dispute the receipt of the letter dated 10 November 1995 (exh NT 2) wherein they were informed that the interest rate has been varied and reduced from 2.00% (condition 2(b) in

letter of offer, exh NT1) to 1.75% + BLR. Further, the plaintiff in exercise of their right under item 2(b) of the letter of offer and cl 5(5) of the facility agreement revised the margin rate from 1.75% to 2.00% effective from 1 July 1998 which was duly notified to the defendants vide letter dated 22 June 1998 (exh NT 5). The defendants' admitted receipt of the notification vide para 3(x) of the first defendant's defence and counterclaim and the second, third and fourth, fifth and sixth defendants' defence and para 5(x) of the first defendant's affidavit (encl 19) and of the second, third and fourth, fifth and sixth defendants' affidavit (encl 20). This shows that the plaintiff have duly complied with their contractual obligation and from the beginning have adhered to this practice, and the fact the defendants have not queried the mode of notifying the variation of interest which has been effected in writing, makes it extremely difficult for the court to believe that the plaintiff had made verbal promises or assurances as the defendants contend.

(6) It is the defendants' contention that the representations and promises should be viewed as a whole in the context of the banking facilities granted to the first defendant and to the related companies, Star Edge Sdn Bhd and Hotel Rasa Sayang Sdn Bhd.

[14] The court is aware of the existence of the handwritten notes on the right side of exh FCL-4, which reads:

> Koay/Helen,
>
> We should decline customer's request on the reduction of rates because (1) margin too fine; (2) facilities to other companies in the group is pegged at 1.5 and BLR (Star Edge SB)/ (RM4.2 m) 1.75 + BLR (Omega Horizon SB) (RM1.68m).

[15] Exhibit FCL-4 is a copy of a letter dated 21 November 1997 from Hotel Rasa Sayang Sdn Bhd signed on its behalf by the second defendant, appealing to the plaintiff for reduction of interest rate in respect of the banking facilities offered to the former. The banking facilities consisted of a revolving credit facility of RM9m and an overdraft facility of RM6m. The plaintiff did not approve the appeal for reduction of interest rate.

[16] Regarding the credit facilities granted to Star Edge Sdn Bhd, the court has, inter alia, in its ruling dated 1 December 2003 in respect of the appeal by Star Edge Sdn Bhd (first defendant) and three other defendants ('the Star Edge suit'), of which the second and third defendants in the Star Edge suit are also the same second and third defendants in the present case ('the Omega Horizon suit') stated that it found it difficult to believe the allegation of a promise in February 1998 to reduce the interest rate applicable to the overdraft facility granted to Star Edge Sdn Bhd to the margin of 1.5%pa when in reality the margin rate applicable at the material time was already 1.5%pa and the court found that such a contention was illogical.

[17] Reverting to exh FCL-4, from the handwritten notes it may be argued that the court can infer that the plaintiff did regard the three companies as a group vis-a-vis the granting of the credit facilities as was urged upon the court by the learned counsel for the defendants.

[18] However, even if this is correct, I wish to ask the defendants why should they approbate and reprobate. Here, I am alluding to para 5(ix) (encl 19) and para 8(a) (encl 20) which states:

> On or about early February 1998 the then manager of the plaintiff's branch at Kuching, one Mr Foo Chow Lee, had, at the request of the Mr Ow Chor Seng, Mr Ow Eang Yeow and myself promised to obtain and assured us as common directors that the plaintiff through its headquarters in Kuala Lumpur would grant reduction on the rate of interest above base lending rate charged through its Kuching branch in respect of the credit facilities granted to Star Edge Sdn Bhd, and the first defendant so as to equal with the interest rate above base lending rate charged by the plaintiff's Johor Bahru branch, ie at 1.5%pa BLR (and presumably a further reduction at the rate 0.5%pa above BLR by February 1999, if the plaintiff had fulfilled its promise or assurance to Hotel Rasa Sayang as explained in para 5 (xviii) herein).

[19] However, in para 5(b) (encl 32) Mr Ow Eang Yeow deposed:

> In reply to para 12 of FCL's affidavit, although the margin/rate of interest under the overdraft facility granted to Star Edge was already reduced to 1.5% above the plaintiff base lending rate, the rest of the allegations in para 5 showed and was intended to show, that the plaintiff failed to honour its promises and representation as follows: ... .

[20] If indeed the consideration of 'a whole package' is true, why have the defendants no explanation to proffer in respect of the margin/rate of interest under the overdraft facility granted to Star Edge Sdn Bhd when it was pointed out that it was already reduced to 1.5% above plaintiff's base lending rate but the defendants (as deposed by Mr Ow Eang Yeow) merely conveniently and dismissively replied as underscored above. In my opinion, the defendants cannot be selective or in the proverbial manner of speaking wish to have the cake and eat it as well.

(7) Furthermore, the allegation that the verbal promises and assurances by the plaintiff were made on three occasions, ie February 1998, December 1998 and 21 April 1999, to wit, has been denied categorically by the plaintiff. Viewing the affidavit evidence and in the light of the matters which I have alluded hitherto, the court is not satisfied that such promises or assurances were made.

(8) The court is mindful of the principle of law relating to the correctness of monthly bank statements to their customers, as is evident from *Paget's Law of Banking* (11th Ed, 1996) London, Edinburgh and Dublin at pp 162–164 which states:

(a) there is no duty on the part of customers to check their monthly bank statements; no estoppel arise from the customer's mere silence;

(b) the continued payment in and withdrawal of monies from a current account even after receipt of a bank statement does not constitute the customer's agreement express or implied, to the balance shown on the statement.

[21] Further in *Tai Hing Cotton Mill Ltd v Liu Chong King Bank Ltd* [1986] AC 80 in relation to the bank's term for opening a current account, Lord Scarman on behalf of the Privy Council opined:

> If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, *the burden of the objection: (sic) and of the sanction imposed must be brought home to the customer.* In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the Macmillan and Greenwood duties. *Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.* (Emphasis added.)

[22] The aforesaid legal proposition is confirmed by the Supreme Court in *United Asian Bank v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 82. However, the facts of *Tai Soon Heng Construction Sdn Bhd* can be distinguished. In that case, the respondent was a customer of the appellant bank and had opened an account at the appellant's branch in Kuala Lumpur. The respondent's accounts clerk who was not an authorized signatory to cheques, forged several cheques of the respondent drawn on the appellant bank. All these cheques were honoured by the appellant and the respondent's account with it was debited in consequence. After the forgeries were discovered, the respondent brought an action against the appellant claiming a sum of RM397,660 being the total of the forged cheques which had been met by the appellant. The learned trial judge gave judgment for the respondent and the appellant appealed and which was dismissed (see headnotes).

[23] In the circumstances of the instant case, the defendants are customers of the plaintiff which provided them with an overdraft facility subject to the terms and conditions contained in the facility letter and facility agreement. Surely if the defendants are relying on the fact that they withheld payments because they allege that they acted on the verbal promises and assurances of the plaintiff, would it not be reasonable for the defendants as prudent businessmen to dispute the statement of accounts which in this case they did not. In my opinion in the context of a banking transaction like in the instant

case, the certificate of indebtedness clause meets the requirement of the rigorous test of a clear and unambiguous provision as alluded to by the Privy Council in *Tai Hing Cotton Mill Ltd*. Thus it is to be borne in mind that there is a certificate of indebtedness clause in the facility agreement and the guarantee (cll 23 and 22 respectively) which would render the amount certified by the plaintiff as conclusive evidence unless there is manifest error. The conduct of the defendants speak volumes for their credibility in the light of the contemporaneous documents produced by the plaintiff.

(9) The defendants also chose not to reply to the letters of demand to regularise their account vide letters dated 15 January 1999, 12 February 1999, 5 March 1999 and 28 May 1999 (exh FCL 6, exh FCL 7, exh FCL 8 and exh FCL 9). The plaintiff followed up with a letter of demand against the defendants for the excess on 16 June 1999 (exh NT 7(a) to exh NT 7(fr) and on 15 December 1999 with a letter of recall demanding for the total outstanding balance which the defendants failed to comply (exh NT 8 (a) to exh NT 8 (gr). Why did the defendants chose to ignore? If what they contend is genuine, they should as any reasonable man would grab the earliest opportunity possible rather than remain silent and raise it as a defence only when proceedings are commenced against them.

(10) The defendants explained that they did not reduce their complaint in writing because they trusted and were assured by Mr Too Chow Lee, in his capacity as the Vice President and Branch Manager of the plaintiff and Ms Helen Lim, Senior Vice President of Corporate Banking Division Head Office of the plaintiff were able to and would fulfil and honour the promises and representations made by them and by reason of their position in the plaintiff bank had fully relied on them. In the light of cl 5(5) of the facility agreement and the written notifications with regard to the variation of the margin rate of interest, it is difficult for the court to accept their explanation, bearing in mind that the second defendant is the company director for three companies and there was no assertion that he was a mere country yokel (per Richard Malanjum JCA in *Abdul Mulok Awang Damit v Perdana Industri Holdings Bhd* [2003] 3 CLJ 497 at p 502.)

(11) In relation to exh OEY 1 of the defendants' supplementary affidavit, the first defendant submitted that the amount of RM 148,417.50 was credited to Star Edge Sdn Bhd's account to avoid the account being classified as non-performing and as a result of the promise made by Mr Too Chow Lee to obtain the purported reduction of interest rate. However it is to be noted that this amount was not pleaded, but instead the sum of RM250,000 was avered to be credited into Star Edge Sdn Bhd's account following the purported promise in December 1998 (see para 3(xiii) of amended defence and counterclaim of the first defendant).

The fact that the first defendant amended the amount from RM250,000 to RM148,417.50 later is telling of the defendants' lack of bona fides.

(12) I find that the defendants have not adduced evidence that would entitle them to rely on the defence of promissory estoppel taking into consideration that there is no evidence that the plaintiff had encouraged or induced them by verbal promises or assurances causing the defendants to default and thereby the plaintiff are estopped for an unconscionable conduct as alleged by them.

(13) After examining the affidavit evidence wholly, I find that there are no triable issues and there is absence of a fair or reasonable probability of the defendants having a real or bona fide defence, I reverse the learned deputy registrar's decision and the appellant/plaintiffs appeal is allowed with costs to be taxed on a solicitor and client basis.

Appeal allowed.

Reported by Lim Lee Na